

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JAN 5 - 1933

Henry H. Rodgers

CLERK

IN THE

Court of Appeals, District of Columbia

No. 5623

160

MELVIN C. McDONALD, *Appellant*,

vs.

COOPERATIVE RESTAURANT, INC., a Corporation,
Appellee.

BRIEF ON BEHALF OF APPELLEE

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Appellee.

INDEX.

SUBJECT INDEX.

	Page
STATEMENT OF CASE	1
ARGUMENT	5
POINT I	5
The court properly directed the verdict for the defendant	5
POINT II	15
The court properly excluded the evidence of the witness contained in the first and second assignment of errors	15
CONCLUSION	20

INDEX OF CASES.

American Mills Co. v. Hoffman, 275 F. 285.....	13, 14
Axman v. Washington Gas Light Co., 38 App. D. C. 150	10
Callahan v. Hyland, 59 Ill. App. 347.....	9
Chunn v. City and Suburban Ry. Co., 23 App. D. C. 55	12
Engle v. U. S., 48 App. D. C. 466	19
Friedlander v. Rapley, 38 App. D. C. 208.....	7
Towes v. D. C., 2 App. D. C. 188.....	11
Knox v. Redwine, 60 W. L. R. 708	6, 9
Lisner v. Hughes, 49 App. D. C. 40.....	6
McMahon v. Matthews, 48 App. D. C. 303.....	11
Meehan v. Morewood, 52 Hun (N. Y.) 566.....	9

	Page
Metropolitan Railroad Co. v. Collins, 1 App. D. C.	
383	17
Muller v. Hillenbrand, 227 N. Y. 448.....	9
Murphy v. New York & Cuba Mail Co., 50 App.	
D. C. 341	19
Roche v. Washington Gas Light Co., 43 App. D. C.	
562	9, 10
Schneider v. American Bridge Co., 31 App. D. C.	
420	13
U. S. v. Lehigh Valley R. Co., 220 U. S. 257, 55 L.	
Ed. 458	12
Vicksburg Ry. Co. v. O'Brien, 119 U. S. 99, 30 L.	
Ed. 299	19
Washington Gas Light Co. v. Lansden, 172 U. S.	
534, 43 L. Ed. 543	6, 7, 9
Williams v. Great Southern Lumber Co., 277 U. S.	
19, 72 L. Ed. 761	19

IN THE
Court of Appeals, District of Columbia

No. 5623

MELVIN C. McDONALD, *Appellant*,

vs.

COOPERATIVE RESTAURANT, INC., a Corporation,
Appellee.

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF CASE

This is an appeal by the plaintiff below from a judgment in the Supreme Court of the District of Columbia entered upon a verdict directed for the defendant at the close of the plaintiff's evidence, in an action to recover damages for personal injuries sustained by the plaintiff as the result of an alleged assault and battery committed upon him while a customer in a restaurant, known as the "Lotus Restaurant," owned and operated by the defendant corporation in the District of Columbia.

The plaintiff's declaration contained two counts in what the plaintiff concedes to be trespass vi et armis and charged in the first count thereof that the servants and agents of the defendant within the scope of their employment "with force and arms, attacked, assaulted, beat, wounded and ill treated the plaintiff"; the second count, also in trespass vi et armis, alleged the same grievance except that the assault is alleged to have been committed maliciously by the corporation itself without reference to its employees or agents.

The testimony introduced by the plaintiff tended to show that on June 15, 1928, the plaintiff went to the defendant's restaurant for dinner. After he finished his meal he noticed a disturbance on the other side of the dining room and deciding to leave because of the disturbance, and while on his way out, was struck from the rear on his head and, in falling, turned in time to see several chinese with water bottles in their hands. On cross-examination the plaintiff denied that he was drunk but admitted that he had been convicted of drunkenness on several occasions both before and after the date of the injuries complained of. The other witnesses introduced by the plaintiff testified that the disturbance arose after a patron of the restaurant, not in the company of the plaintiff, attempted to solicit of certain young ladies the privilege of dancing with them, in violation of a rule of the restaurant prohibiting guests from dancing with persons not in their company; that, as the gentleman approached the table occupied by the ladies and was about to begin to dance with one of them, a chinese waiter came over and put his hand upon the guest's shoulder. The gentleman resenting the intervention of the waiter used heated words and raised his voice and finally with force

pushed the waiter away from him. The witness then testified that a general disturbance arose between cohorts of the belligerent gentlemen and the chinese waiters; that the meleé resulted in persons rushing to the exits and a panic ensued. The testimony of the plaintiff's witnesses did not disclose where the plaintiff was but that the person who precipitated the disturbance was not the plaintiff. Another witness introduced by the plaintiff testified as to the origin of the disturbance and also testified that the plaintiff did not participate in the quarrel nor in the fracas which took place immediately thereafter, notwithstanding the general testimony of the witnesses that the disturbance resulted in a general combat between the obstinate gentlemen and the chinese waiters. The witness further testified that he subsequently saw the plaintiff, covered with blood, scream "Murder, Police" and that he, the witness, asked the hat check girl to call the police whereupon she replied that her orders were not to call the police. No testimony was introduced as to the identity of the person who struck the plaintiff, nor upon the scope of employment of the waiters in the restaurant, nor upon the direction by the defendant of the acts allegedly committed by its servants and agents. There was no evidence to show whether the plaintiff was struck by a patron or a waiter or merely by a fall.

At the close of the plaintiff's case the defendant moved the court for a directed verdict and the verdict for the defendant was accordingly directed on the ground of variance between the proof and the pleadings. After the court had indicated that a verdict was to be directed the plaintiff thereafter requested leave of court to file an amended declaration by adding two

The plaintiff's declaration contained two counts in what the plaintiff concedes to be trespass vi et armis and charged in the first count thereof that the servants and agents of the defendant within the scope of their employment "with force and arms, attacked, assaulted, beat, wounded and ill treated the plaintiff"; the second count, also in trespass vi et armis, alleged the same grievance except that the assault is alleged to have been committed maliciously by the corporation itself without reference to its employees or agents.

The testimony introduced by the plaintiff tended to show that on June 15, 1928, the plaintiff went to the defendant's restaurant for dinner. After he finished his meal he noticed a disturbance on the other side of the dining room and deciding to leave because of the disturbance, and while on his way out, was struck from the rear on his head and, in falling, turned in time to see several chinese with water bottles in their hands. On cross-examination the plaintiff denied that he was drunk but admitted that he had been convicted of drunkenness on several occasions both before and after the date of the injuries complained of. The other witnesses introduced by the plaintiff testified that the disturbance arose after a patron of the restaurant, not in the company of the plaintiff, attempted to solicit of certain young ladies the privilege of dancing with them, in violation of a rule of the restaurant prohibiting guests from dancing with persons not in their company; that, as the gentleman approached the table occupied by the ladies and was about to begin to dance with one of them, a chinese waiter came over and put his hand upon the guest's shoulder. The gentleman resenting the intervention of the waiter used heated words and raised his voice and finally with force

pushed the waiter away from him. The witness then testified that a general disturbance arose between cohorts of the belligerent gentlemen and the chinese waiters; that the meleé resulted in persons rushing to the exits and a panic ensued. The testimony of the plaintiff's witnesses did not disclose where the plaintiff was but that the person who precipitated the disturbance was not the plaintiff. Another witness introduced by the plaintiff testified as to the origin of the disturbance and also testified that the plaintiff did not participate in the quarrel nor in the fracas which took place immediately thereafter, notwithstanding the general testimony of the witnesses that the disturbance resulted in a general combat between the obstinate gentlemen and the chinese waiters. The witness further testified that he subsequently saw the plaintiff, covered with blood, scream "Murder, Police" and that he, the witness, asked the hat check girl to call the police whereupon she replied that her orders were not to call the police. No testimony was introduced as to the identity of the person who struck the plaintiff, nor upon the scope of employment of the waiters in the restaurant, nor upon the direction by the defendant of the acts allegedly committed by its servants and agents. There was no evidence to show whether the plaintiff was struck by a patron or a waiter or merely by a fall.

At the close of the plaintiff's case the defendant moved the court for a directed verdict and the verdict for the defendant was accordingly directed on the ground of variance between the proof and the pleadings. After the court had indicated that a verdict was to be directed the plaintiff thereafter requested leave of court to file an amended declaration by adding two

The plaintiff's declaration contained two counts in what the plaintiff concedes to be trespass vi et armis and charged in the first count thereof that the servants and agents of the defendant within the scope of their employment "with force and arms, attacked, assaulted, beat, wounded and ill treated the plaintiff"; the second count, also in trespass vi et armis, alleged the same grievance except that the assault is alleged to have been committed maliciously by the corporation itself without reference to its employees or agents.

The testimony introduced by the plaintiff tended to show that on June 15, 1928, the plaintiff went to the defendant's restaurant for dinner. After he finished his meal he noticed a disturbance on the other side of the dining room and deciding to leave because of the disturbance, and while on his way out, was struck from the rear on his head and, in falling, turned in time to see several chinese with water bottles in their hands. On cross-examination the plaintiff denied that he was drunk but admitted that he had been convicted of drunkenness on several occasions both before and after the date of the injuries complained of. The other witnesses introduced by the plaintiff testified that the disturbance arose after a patron of the restaurant, not in the company of the plaintiff, attempted to solicit of certain young ladies the privilege of dancing with them, in violation of a rule of the restaurant prohibiting guests from dancing with persons not in their company; that, as the gentleman approached the table occupied by the ladies and was about to begin to dance with one of them, a chinese waiter came over and put his hand upon the guest's shoulder. The gentleman resenting the intervention of the waiter used heated words and raised his voice and finally with force

pushed the waiter away from him. The witness then testified that a general disturbance arose between cohorts of the belligerent gentlemen and the chinese waiters; that the meleé resulted in persons rushing to the exits and a panic ensued. The testimony of the plaintiff's witnesses did not disclose where the plaintiff was but that the person who precipitated the disturbance was not the plaintiff. Another witness introduced by the plaintiff testified as to the origin of the disturbance and also testified that the plaintiff did not participate in the quarrel nor in the fracas which took place immediately thereafter, notwithstanding the general testimony of the witnesses that the disturbance resulted in a general combat between the obstinate gentlemen and the chinese waiters. The witness further testified that he subsequently saw the plaintiff, covered with blood, scream "Murder, Police" and that he, the witness, asked the hat check girl to call the police whereupon she replied that her orders were not to call the police. No testimony was introduced as to the identity of the person who struck the plaintiff, nor upon the scope of employment of the waiters in the restaurant, nor upon the direction by the defendant of the acts allegedly committed by its servants and agents. There was no evidence to show whether the plaintiff was struck by a patron or a waiter or merely by a fall.

At the close of the plaintiff's case the defendant moved the court for a directed verdict and the verdict for the defendant was accordingly directed on the ground of variance between the proof and the pleadings. After the court had indicated that a verdict was to be directed the plaintiff thereafter requested leave of court to file an amended declaration by adding two

new counts purporting to state a cause of action in trespass on the case, notwithstanding the fact that the amendment was proposed after the court had indicated that the verdict was to be directed and after the plaintiff had closed his case and after the expiration of more than three years from the date of the alleged injuries and notwithstanding the fact that the evidence neither supported the original declaration nor the proposed amended counts and further notwithstanding that the proposed amended counts changed the form of action from trespass *vi et armis* to trespass on the case founded upon negligence. Leave to amend was accordingly denied and verdict for the defendant was directed.

A motion for new trial was duly argued and a new trial denied, whereupon the plaintiff noted his appeal to this court.

The assignment of errors and arguments contained in appellant's copious brief present but a single and fundamental principle of procedural or adjective law; viz., were the allegations of the appellant's pleading supported by evidence sufficient to justify submitting the case to the jury or did the evidence fail to support either the allegations of the original declaration in trespass *vi et armis* or the declaration as amended in trespass on the case founded upon negligence. Error is also charged in the ruling of the court sustaining defendant's objection to the testimony of one of the plaintiff's witnesses that the hat check girl had told him that her orders were not to call the police and that the manager of the restaurant drew a pistol and pointed it to the ceiling, threatening to shoot if order were not restored.

ARGUMENT

POINT I

The Court Properly Directed the Verdict for the Defendant.

A. The court properly directed the verdict for defendant on the ground that there was not sufficient evidence to support the allegations of the original declaration and because there was a variance between the pleadings and the proof.

The academic but learned narration of the historical development of the doctrine of respondeat superior contained in appellant's brief represents only a skeleton outline of a treatment accorded thereto in sections 2233 to 2244 of Labbatt's Master and Servant. The difficulty lies not in its historical accuracy but in its propriety and applicability in the case at bar.

We have long passed the day in the law where serious argument has been presented to deny the liability of a master for the tortious acts committed by his servant within the scope of his employment. The verbose circumlocution of the appellant has failed to recognize the real issue. Upon this appeal no question is presented as to the necessity of an allegation of direction by the master as a condition precedent to his liability for acts committed by his servant within the scope of his employ. It is conceded that according to the substantive law such an allegation is not essential to liability. But the appellant has wholly failed to recognize that, conceding the foregoing principle, it is necessary that proof of some authority in the agent to do the acts complained of or some direction to do those acts is essential to hold the principal liable in trespass vi et armis. Counsel for appellant conceded that the

declaration was in trespass vi et armis. (Page 7, Bill of Exceptions). It is inescapable that the real issue must have been blindly touched upon at page 21 of appellant's brief where it is said:

"The precise point is decided in a New Jersey case of 1903 holding that while either express command or general authority must be proved, neither need be pleaded, being matters of evidence."

Earlier in appellant's brief, at page 7, the same proposition is again adverted to with reference to the proposed analogous cases of ejecting passengers from railroad cars, which cases, however, are clearly distinguishable:

"It is sufficient to prove—but not necessary to allege—that the conductor had a general authority to expel persons not paying their fare or otherwise misconducting themselves and that he exercised that authority erroneously in the particular instance."

Apart from whatever conflict there may exist amongst the authorities upon the nature of the allegations necessary to constitute an action in trespass vi et armis or trespass on the case, the authorities are clear in requiring that there be some evidence of authority in the servant or agent or direction by the master, express or implied, in order to hold the master liable in trespass vi et armis for his servant's malfeasance.

Knox v. Redwine, 60 W. L. R. 708, 61 App. D. C. —;

Lisner v. Hughes, 49 App. D. C. 40;

Washington Gas Light Co. v. Lansden, 172 U. S. 534, 43 L. ed. 543.

In *Washington Gas Light Co. v. Lansden, supra*, where it was sought to charge the Gas Company for an alleged libel published by its general manager, it was held that, in order to hold the master responsible in such a case:

“There must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment in regard to the subject matter . . . There need be no written authority under seal or vote of the corporation, constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject matter involved may be fairly and legitimately inferred by the court or jury.”

It is clearly insufficient to rely upon an allegation that the acts were committed by the defendant through its agents within the scope of their employment.

It is held that an averment that the defendant by his agent acting within the scope of the duties of his employment assaulted and beat the plaintiff is not sufficient to show that the alleged agent, in making the assault, was the agent of the defendant, charged with the conduct of any matter that would make the principal responsible for either his authorized or unauthorized acts done in the course of his employment. This is held to be a mere conclusion of law.

Friedlander v. Rapley, 38 App. D. C. 208.

And when, as in the case at bar, such a defect in pleading is not taken advantage of by demurrer such

failure to demur does not constitute an estoppel to prevent the defendant from having a verdict directed in its favor where the conclusion remains, at the end of the plaintiff's case, a mere legal conclusion, there being no evidence produced tending to support it. Such is the situation in the case at bar.

The substance of the appellant's mistaken contention is that the court directed the verdict for the defendant on the ground that the declaration failed to allege that the wrongful acts of the defendant's servants and agents were committed pursuant to the direction and command of the corporation. From page 1 to page 19 of the appellant's brief, the proposition is sought to be established that to hold a master liable in trespass *vi et armis*, it is not necessary to allege in the declaration that the acts were committed under the express authority and direction of the master. Even if this principle is true, the lengthy argument of the appellant is seemingly unnecessary since the appellee did not attack the validity of that proposition during the argument. The proposition insisted upon by the appellant was that since the declaration and both counts thereof were in trespass *vi et armis* the evidence produced sufficiently supported the action in trespass *vi et armis*. The specific ground upon which the court directed the verdict was not at all based upon a failure to allege authority, direction or command by the corporation, but because the evidence produced failed to support the theory of the case, as presented by the plaintiff, that the alleged assault was authorized by the corporation. The testimony went no further than to show that a general disturbance arose amongst persons present in the restaurant and that the plaintiff was injured. There was no evidence pro-

duced which tended to show knowledge, notice, authority, acquiescence or ratification on the part of the officers of the corporation or its manager. There was no evidence introduced to show that the disturbance arose as a result of incitement by or wrongful acts of the employees of the restaurant nor was any proof elicited to show the scope and limitations of authority of the waiters in the restaurant to eject persons violating its rules or acting disorderly.

As heretofore stated the evidence produced at the trial was devoid of any semblance of testimony relative to the scope of authority of the defendant's agents or of any authority or direction to act as charged. In the absence of such testimony this court has repeatedly held that a verdict for the defendant is properly directed.

Lisner v. Hughes, supra;
Washington Gas Light Co. v. Lansden, supra.

The liability of a master for the malicious acts of his servant or agent, not directly arising out of and in the performance of the master's business, must be shown to have been authorized, expressly or impliedly, by the master. Whatever different rule may apply in the case of ordinary torts, it is held that proof of such authority is indispensable where the tort charged is of a malicious character.

Roche v. Washington Gas Light Co., 43 App. D. C. 562;
Muller v. Hillenbrand, 227 N. Y. 448, 125 N. E. 808;
Meehan v. Morewood, 52 Hun. (N. Y.) 566;
Callahan v. Hyland, 59 Ill. App. 347.

In the *Roche case* this court further emphasized the necessity of clear proof of authorization where the court said, at page 580: "Assuming that the evidence has a tendency to show that he authorized Blackman to prosecute Roche, there is nothing to show that the corporation either directed him to act, or approved and ratified his act after it was done."

The case of *Axman v. Washington Gas Light Co.*, 38 App. D. C. 150, relied upon by the plaintiff is clearly distinguishable from the case at bar. In that case the gas inspectors were on no mission of their own in breaking into the plaintiff's cellar for the purpose of reading the gas meter. The evidence there clearly showed that the assault was committed in the performance of a duty for the master. All of the circumstances in the *Axman case* tended to support the theory that at the time of the assault upon the plaintiff the servants of the defendant had not turned aside from the business of their principal but were in the performance of their master's business. At page 158 the court said:

"Of course, the moment the agent turns aside from the business of the principal and commits an independent trespass, the principal is not liable. The agent is not then acting within the scope of his authority in the business of the principal, but in the furtherance of his own ends."

Besides the total failure of evidence as to direction or authorization by the corporation and of evidence which might have tended to show the extent of the authority and scope of employment of the waiters in the restaurant, the testimony further failed to present sufficient facts concerning the injury inflicted

upon the plaintiff. Neither the plaintiff nor any of his witnesses saw the person who struck the plaintiff. During the fracas which occurred in the restaurant the only legitimate inference to be drawn from the evidence is that a "free-for-all" ensued and that the plaintiff was struck by someone, without any affirmative evidence thereon, save the plaintiff's inference that the injury must have been inflicted by a chinese waiter carrying a water bottle whom the plaintiff testified he saw when he fell. It is submitted, upon this ground alone, the court could properly have directed the verdict for the defendant. The conclusion of the court in directing the verdict was therefore proper, notwithstanding the fact that the court may not have stated all the grounds supporting its ruling.

Howes v. District of Columbia, 2 App. D. C. 188, 191;

McMahon v. Matthews, 48 App. D. C. 303, 308.

B. The court properly directed the verdict on the ground that there was not sufficient evidence to support the proposed amended declaration.

After the plaintiff has rested his case the defendant moved the court for a directed verdict. After prolonged argument of the motion the court indicated that a verdict would have to be directed for the defendant, whereupon counsel for the plaintiff stated to the court that "if the court held that a verdict should be directed, the plaintiff should be permitted to amend his declaration with the inclusion of two counts in negligence." (Page 8, Bill of Exceptions.) The court thereafter held that the verdict was directed and the plaintiff therefore would not be allowed to reopen his

case after having rested, in order to establish the additional counts founded upon negligence.

To avoid reiteration, it is submitted that the evidence produced was equally insufficient to support the proposed amended counts. The counts were not drawn to conform to the proof already presented. To have done so would have amounted to a failure to state a good cause of action. The purpose of the proposed amendment was to allow the jury to speculate upon the negligence of the corporation as to which there was no evidence. Therefore, since the plaintiff's case had all been presented at the time of the proposed amendment the only possible avenue left to the plaintiff would have been to allow the plaintiff to reopen his case, after he had rested and after the court had directed a verdict and introduced evidence upon the question of negligence. It is plainly apparent that this would have amounted to prejudice and surprise. Though the cause of action may have remained the same in the sense that the plaintiff sought damages for personal injuries, the form was thereby changed and the defendant's defense thereto would necessarily have been different than the defense prepared and set up in defendant's pleas.

The amendment of pleadings is not a matter of right vested in a party litigant, but is a privilege to be granted according to the sound discretion of the court. The exercise of this discretion by the trial court is not reviewable on appeal without a showing of abuse.

U. S. v. Lehigh Valley R. Co., 220 U. S. 257, 55 L. ed. 458;
Chunn v. City & Suburban Ry. Co., 23 App. D. C. 55;

Schneider v. American Bridge Co., 31 App. D. C. 420;
American Mills v. Hoffman, 275 F. 285.

The time or stage of the proceedings where an amendment will be allowed depends upon the nature of the amendment and the probability of prejudice to the adverse party. No absolute rule of law is established limiting the foregoing elements and it is held that these too fall within the court's discretion.

In *Schneider v. American Bridge Co. supra*, which was an action for personal injuries sustained by the plaintiff while in the defendant's employ, the plaintiff asked leave to amend his declaration, after the jury had been sworn but before the case had proceeded any further. The amendment sought was the insertion of the words "upon the statutes of New York in such case made and provided." The court refused to grant leave to amend on the ground that the amendment came too late under all the circumstances of the case. This court, in affirming the ruling of the court said, through Mr. Chief Justice Shepard:

"The grant or refusal of leave to amend is a matter within the discretion of the trial court. (Citations.) We perceive no abuse of that discretion in this instance. The case had been at issue since February 25, 1907, and no reason appeared why the plaintiff waited until the trial had begun to ask for leave to amend in respect of a matter which was presumably within his knowledge when the action was begun."

In the *Schneider* case, the court properly refused the amendment even before the plaintiff had introduced any evidence in support of his case. In the case

at bar this circumstance appears with greater force since the plaintiff had already announced to the court that he rested his case and the court, after argument, indicated that the verdict would be directed for the defendant.

In *American Mills Co. v. Hoffman*, *supra*, the Circuit Court of Appeals for the Second Circuit reversed a judgment of the District Court, where the amendment was allowed in a situation analogous to that presented in the case at bar, and held that the allowance of the amendment was improper since the plaintiff would have had to reopen his case and introduce new evidence in order to support the amendment. The original complaint in the Hoffman case was for goods sold and delivered. The amendment which the District Judge allowed changed the theory of the action to one for breach of contract for refusal to accept goods. The plaintiff had already introduced evidence in support of the original complaint and the trial judge allowed the amendment. Speaking for the Circuit Court of Appeals, Circuit Judge Rogers said:

“After the amendment was made in order to support the amended complaint it was necessary to reopen the case and allow the plaintiff to call new witnesses and to introduce entirely new testimony. The original claim had been changed in a ‘substantial’ manner, and in doing so the court exceeded its authority.”

“It is no answer to say that the defendant was not harmed by what was done. We have no right to speculate upon that question.”

It is, therefore, submitted that, without arguing the additional circumstances that the proposed amendment changed the form of action and the further fact that

more than three years had elapsed since the cause of action had accrued, the court properly refused to allow the amendment both upon the ground that it was untimely and would result in prejudice to the defendant as well as upon the ground that it failed to conform to the proof, all of which failed to present a good cause of action.

POINT II

The Court Properly Excluded the Evidence of the Witness Contained in the First and Second Assignment of Errors.

One of the appellant's witnesses, Herman Friedman, testified that during the fracas and while all the guests rushed madly for the exit "he ran over to the hat check girl and asked her to call the police, and that she replied that her orders were not to call the police" (Page 4, Bill of Exceptions). Counsel for the defendant then objected to this statement of the witness which objection the court sustained. No offer of proof was made by the plaintiff nor did the plaintiff specify for what purpose the declaration of the hat check girl was to be used. There was further a total failure of any evidence as to the identity of any person who is alleged to have given the orders to the hat check girl. The evidence went no further than to show that a girl, apparently employed as a hat check girl, had been ordered by someone not to call the police, which she is charged with having told the witness as a narration of a past transaction. When the order was given was not shown. It is clear, however, that the girl did not participate in the turmoil and her

authority as a servant of the corporation was limited in its scope.

The appellant now contends that the exclusion of the evidence amounted to error, on the ground that the declaration was admissible as part of the *res gestae*. The appellant has failed to cite cases in support of this contention. Apart from any considerations of the hearsay rule, it is submitted that the testimony was properly excluded because of a failure of evidence as to the nature and scope of employment of the hat check girl and the total absence of any testimony as to the authority of the person who is alleged to have given the orders to the hat check girl. The necessity of showing the authority or position of the person giving the orders was essential before this evidence could have been admitted as against the corporation.

The testimony of the hat check girl was probably sought to be admitted for the purpose of showing that an agent of the corporation was in command of the conduct of the waiters during the disturbance which occurred. The total absence of any testimony as to the identity of the person giving the orders rendered the witness's testimony not only prejudicial but also pure hearsay. It was further not shown that the person who gave her the orders was an employee of the corporation or a mere patron of the Restaurant excited by the turmoil and desirous of non-interference by police. If any testimony as to the alleged orders received by the hat check girl were admissible it is submitted that the testimony of the hat check girl would have been the best evidence. To accept the doctrine of *res gestae* in this situation is to effectively nullify the Hearsay Rule.

The declaration of the hat check girl related to a past occurrence in which she did not participate. In *Metropolitan Railroad Co. v. Collins*, 1 App. D. C. 383, the plaintiff sued the defendant for personal injuries sustained while engaged in stepping onto the defendant's street car at a transfer point, which car suddenly started, causing the plaintiff to fall to the street. The plaintiff called a witness to testify to certain declarations alleged to have been made by the defendant's transfer agent to the effect that the conductor of the street car started too soon and that he would get into trouble. The trial judge held the testimony of the witness admissible as part of the *res gestae*. The Court of Appeals, in reversing a judgment for the plaintiff on the ground that the declarations of the transfer agent were improperly admitted, presented a clear statement of the requisites of the rule when applied to declarations of servants or agents. The court said:

“This rule is, (*res gestae*) that the declarations must be made by a party to the transaction, must grow out of it, serve to illustrate its character and derive some degree of credit from it. * * * But they are, on the other hand, not to be admitted where narrative merely of that which has occurred, no matter how near they may be connected in point of time therewith.

“In every case in which declarations have been admitted as part of the *res gestae*, we think it will be found that they came either from an injured or wounded person or from the other actor or actors in the transaction. The rule will be found to be relaxed in cases where the person injured was a child, and made the explanatory statements to the father or mother upon first meeting and while suffering from the injuries re-

authority as a servant of the corporation was limited in its scope.

The appellant now contends that the exclusion of the evidence amounted to error, on the ground that the declaration was admissible as part of the *res gestae*. The appellant has failed to cite cases in support of this contention. Apart from any considerations of the hearsay rule, it is submitted that the testimony was properly excluded because of a failure of evidence as to the nature and scope of employment of the hat check girl and the total absence of any testimony as to the authority of the person who is alleged to have given the orders to the hat check girl. The necessity of showing the authority or position of the person giving the orders was essential before this evidence could have been admitted as against the corporation.

The testimony of the hat check girl was probably sought to be admitted for the purpose of showing that an agent of the corporation was in command of the conduct of the waiters during the disturbance which occurred. The total absence of any testimony as to the identity of the person giving the orders rendered the witness's testimony not only prejudicial but also pure hearsay. It was further not shown that the person who gave her the orders was an employee of the corporation or a mere patron of the Restaurant excited by the turmoil and desirous of non-interference by police. If any testimony as to the alleged orders received by the hat check girl were admissible it is submitted that the testimony of the hat check girl would have been the best evidence. To accept the doctrine of *res gestae* in this situation is to effectively nullify the Hearsay Rule.

The declaration of the hat check girl related to a past occurrence in which she did not participate. In *Metropolitan Railroad Co. v. Collins*, 1 App. D. C. 383, the plaintiff sued the defendant for personal injuries sustained while engaged in stepping onto the defendant's street car at a transfer point, which car suddenly started, causing the plaintiff to fall to the street. The plaintiff called a witness to testify to certain declarations alleged to have been made by the defendant's transfer agent to the effect that the conductor of the street car started too soon and that he would get into trouble. The trial judge held the testimony of the witness admissible as part of the *res gestae*. The Court of Appeals, in reversing a judgment for the plaintiff on the ground that the declarations of the transfer agent were improperly admitted, presented a clear statement of the requisites of the rule when applied to declarations of servants or agents. The court said:

“This rule is, (*res gestae*) that the declarations must be made by a party to the transaction, must grow out of it, serve to illustrate its character and derive some degree of credit from it. * * * But they are, on the other hand, not to be admitted where narrative merely of that which has occurred, no matter how near they may be connected in point of time therewith.

“In every case in which declarations have been admitted as part of the *res gestae*, we think it will be found that they came either from an injured or wounded person or from the other actor or actors in the transaction. The rule will be found to be relaxed in cases where the person injured was a child, and made the explanatory statements to the father or mother upon first meeting and while suffering from the injuries re-

cieved. (Citations) * * * The rule has always been more strictly observed in cases where the declarations of the agents or employees of a defendant have been sought to be introduced against him; these when admitted have been made very shortly after the transaction, with the evidence of the wreck and damage immediately around, and amid the excitement of trying scenes. * * *

But in a case where the declaration of the engineer of the wrecked train was made within a short time afterwards, and while at the place, it was held inadmissible, the court saying: 'It is not to be deemed part of the *res gestae* simply because of the brief period intervening between the accident and the making of the declaration. The facts remain that the occurrence had ended when the declaration in question was made and the engineer was not in the act of doing anything which could possibly affect it.' *V. & M. R. R. v. O'Brien*, 119 U. S. 99.

"If the declaration offered had been made by the conductor of the car whose negligence, according to the plaintiff, caused the injury, the error would not be so clear; but the transfer agent was not an actor in the occurrence and had nothing to do with it. *If it be conceded that he saw the accident and knew its cause which is the natural inference from his statement, if truly reported—yet it is clear that what he said, though near in point of time, was narrative only of a past transaction. It was not a spontaneous outburst incident to the occurrence or illustrative of any part of it.* (Italics supplied.)

In the case at bar as in the cited case, the declaration of the hat check girl was a pure narration of a past occurrence. The elements of proximity to the occurrence and participation therein were wholly lacking in the instant case. Nor was there any tender of proof

to the effect that the hat check girl was unavailable as a witness. In the Collins case the court further said:

“This witness was not in the employ of the defendant at the time of the trial. He was in attendance as a witness and was competent to testify to the cause of the accident, if in fact he did witness it, and knew anything of the cause of the plaintiff’s injury. He could not be made a witness in this indirect manner.”

In the Collins case at page 390, the court further held that the rule would be the same even if the transfer agent had been an ordinary bystander.

Declarations and admissions by agents, unless clearly shown to be admissible as part of the *res gestae*, are incompetent as evidence against the master and fall within the hearsay rule.

Engle v. U. S., 48 App. D. C. 466;

Murphy v. New York & Cuba Mail S. S. Co., 50 App. D. C. 341.

The declarations of the hat check girl to the witness Friedman were therefore incompetent as evidence against the corporation.

Williams v. Great Southern Lumber Co., 277 U. S. 19, 25, 72 L. ed. 761, 767;

Vicksburg Ry. Co. v. O’Brien, 119 U. S. 99, 30 L. ed. 299.

With reference to the second assignment of error it is submitted that the plaintiff could not possibly have been prejudiced by the exclusion of the testimony that the manager of the defendant corporation had drawn a pistol and threatened to shoot at the ceiling if order were not restored. The legitimate inference

to be drawn from this testimony is that an agent of the corporation did make some effort to terminate the disorder. If the purpose of the testimony was to prove a wrongful act of the corporation it is difficult to see how this testimony in any way tended to do so. The obvious purpose of the testimony was to prejudice and impress the jury with the fact of possession of a revolver by the alleged manager of the restaurant. The plaintiff took exception to the ruling of the court excluding the evidence but made no tender of the purpose of the testimony other than its probable prejudice to the defendant.

CONCLUSION

It is respectfully submitted that since the evidence produced by the plaintiff wholly failed in the necessary particulars as set forth in the argument herein, the court properly directed the verdict for the defendant. It is further submitted that the refusal of the trial court to grant leave to the plaintiff to file the two proposed amended counts to the declaration does not constitute an abuse of judicial discretion. It is further submitted that the exclusion of the testimony of the plaintiff's witness, as to the declaration of the hat check girl and the conduct of the alleged manager of the restaurant, does not constitute reversible error.

It is, therefore, respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Appellee.

